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No. 93-1475

In the Supreme Court of the United States

OCTOBER TERM, 1993

PETER CHUI LIN WONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Sentencing Commission has statutory authority to promulgate Sentencing Guidelines § 1B1.3(a)(2), which requires sentencing courts to consider relevant conduct beyond the offense of conviction in determining the appropriate sentencing range for certain offenses.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A33) is reported at 2 F.3d 927.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1993. A petition for rehearing was denied on December 8, 1993. Pet. App. B1. The petition for a writ of certiorari was filed on March 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the Northern District of California, petitioner was convicted on two counts of bank fraud, in violation of 18 U.S.C. 1344. The district court sentenced petitioner to 30 months' imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. A1-A33; Gov't C.A. Br. 2-3.

1. Petitioner was charged in a 23-count superseding indictment with having engaged in a scheme to defraud various federally-chartered or insured banks. The scheme involved the issuance of false bills of lading by the Pacific Atlantic Trading Company (PATCO). For example, PATCO filed false bills of lading misrepresenting that various goods had already been shipped aboard named vessels. Banks then credited appropriate amounts to PATCO. The plea agreement identified a loss of $4.3 million arising from the fraudulent scheme. Pet. App. A2-A3; Gov't C.A. Br. 3-10.

Petitioner pleaded guilty to one count involving a transaction with the Bank of Credit and Commerce International and another involving the Bank of Trade. The central issue at sentencing was whether the district court should base petitioner's offense level on the total losses resulting from the fraudulent scheme or on the approximately $100,000 lost in connection with the two counts of conviction. The district court sentenced petitioner based on the total loss. In so doing, the court relied on Sentencing Guidelines § 1B1.3(a)(2), which requires consideration of "all acts and omissions * * * that were part of the same course of conduct or common scheme or plan as the offense of conviction." Pet. App. A2-A3.

2. The court of appeals affirmed. Pet. App. A1-A33. Relying on *United States* v. *Fine*, 975 F.2d 596 (9th Cir. 1992) (en banc), the court held that crimes of fraud would require grouping under Guidelines § 3D1.2(d), and that Guidelines § 1B1.3 therefore requires sentencing courts to consider conduct related to the offense of conviction. Pet. App. A2-A4. The court rejected petitioner's argument that the relevant conduct provisions exceed the Sentencing Commission's statutory authority. The court explained that "Congress authorized the Commission to promulgate guidelines that take into account 'the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense,'" and that "[t]he relevant conduct provisions can be seen as an effort to implement that objective." *Id.* at A5 (quoting 28 U.S.C. 994(c)(2)). Finally, the court of appeals rejected petitioner's contention that Section 1B1.3(a)(2) violates the Due Process Clause because the Guidelines allow proof of relevant conduct by a preponderance of the evidence. Pet. App. A7-A8.*

ARGUMENT

Petitioner contends (Pet. 6-12) that the Commission violated its statutory mandate in basing the Guidelines

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* Judge Norris dissented. Pet. App. A8-A33. He contended that Section 1B1.3(a)(2) is contrary to statutory provisions requiring the Commission to "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct" (28 U.S.C. 991(b)(1)(B)); to ensure that the Guidelines reflect "the appropriateness of imposing an incremental penalty for each offense [when] a defendant is convicted of * * * multiple offenses committed in the same course of conduct" (28 U.S.C. 994(*l*)(1)(A)); and to "provide certainty and fairness" in sentencing (28 U.S.C. 991(b)(1)(B)). See Pet. App. A13-A21.

range on the complete course of conduct surrounding the offense of conviction. That contention lacks merit. Congress directed the Commission to "establish sentencing policies and practices * * * that assure the meeting of the purposes of sentencing set forth in [18 U.S.C.] 3553(a)(2)." 28 U.S.C. 991(b)(1)(A). Section 3553(a)(2), in turn, broadly provides that the Commission shall consider the need for the sentence "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

This Court has long recognized that a sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972); see, *e.g.*, *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2199 (1993); *Chapman* v. *United States*, 500 U.S. 453, 465 (1991); *United States* v. *Grayson*, 438 U.S. 41, 49-50 (1978); *Williams* v. *New York*, 337 U.S. 241, 246-247 (1949). Consistent with that principle, sentencing courts have traditionally been permitted to consider criminal conduct not resulting in conviction when determining an appropriate sentence within the statutory range for the offense of conviction. See, *e.g.*, *Williams* v. *New York*, *supra*. Guidelines § 1B1.3 implements that principle by allowing sentencing courts to consider a defendant's related conduct in determining the proper sentencing range for his offense of conviction.

In addition, Congress explicitly authorized the Commission to promulgate Guidelines for district courts to

use in "determin[ing] * * * the appropriate length of a term * * * of imprisonment." 28 U.S.C. 994(a)(1)(B). In so doing, the Commission must "establish a sentencing range that is consistent with all pertinent provisions of title 18" (28 U.S.C. 994(b)(1)), and it must therefore comply with the directive that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court * * * may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661. Finally, Congress specifically authorized the Commission to take into account, "among other[]" matters, "the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense." 28 U.S.C. 994(c).

In light of those broad grants of authority, the courts of appeals have consistently held that the Commission validly promulgated the relevant conduct provisions found in Section 1B1.3(a)(2). See, *e.g.*, *United States* v. *Gracia*, 983 F.2d 625, 629 (5th Cir. 1993); *United States* v. *Galloway*, 976 F.2d 414 (8th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1420 (1993); *United States* v. *Davern*, 970 F.2d 1490, 1495 n.6 (6th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1289 (1993); *United States* v. *Ebbole*, 917 F.2d 1495, 1501 (7th Cir. 1990).

Petitioner argues (Pet. 9-10) that the "relevant conduct" Guideline conflicts with the Commission's mandate to "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. 991(b)(1)(B). But because the relevant conduct considered under Section 1B1.3(a)(2) bears directly on the seriousness of the offense of conviction, it is not an "unwarranted" disparity when a defendant receives a

more severe sentence for an offense that is part of a more extensive scheme of criminal conduct.

Petitioner next contends (Pet. 10-11) that Section 1B1.3(a)(2) conflicts with the statutory directive to ensure that the Guidelines reflect "the appropriateness of imposing an incremental penalty for each offense [when] a defendant is convicted of * * * multiple offenses committed in the same course of conduct" (28 U.S.C. 994(*l*)(1)(A)). Section 994(*l*), however, addresses only the need for incremental penalties for multiple convictions; it "contains no language indicating that it is to be read restrictively or exclusively, and * * * does not preclude the consideration of uncharged conduct in [S]ection 1B1.3(a)(2)." *Galloway*, 976 F.2d at 422; see also *Ebbole*, 917 F.2d at 1501.

Finally, petitioner argues (Pet. 11-12) that the "relevant conduct" Guideline does not satisfy the statutory requirement of "certainty and fairness in meeting the purposes of sentencing." 28 U.S.C. 991(b)(1)(B). He argues that Guidelines are not certain or fair because they permit the defendant to be sentenced without the usual constitutional protections that accompany a criminal conviction. But "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all," *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91 (1986), and the courts of appeals have uniformly held that, absent extraordinary circumstances (of a type not present here), the preponderance-of-the-evidence standard governs resolution of disputed facts under the Guidelines. See *United States* v. *Restrepo*, 946 F.2d 654, 655-656 (9th Cir. 1991) (en banc) (collecting cases), cert. denied, 112 S. Ct. 1564 (1992); see also *id.* at 656 n.1 (distinguishing *United States* v. *Kikumura*, 918 F.2d 1084 (3d Cir. 1990)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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